Supreme Court, U.S.
FILED
95 1770 FEB 28 1996
OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

LAFAYETTE MOREHOUSE INC., et al.,
Petitioners,
v.
THE CHRONICLE PUBLISHING COMPANY, et al.,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of California, First Appellate District, Division Five

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the California anti-SLAPP statute (California Code of Civil Procedure section 425.16) is unconstitutional and therefore denies Petitioners' due process as required under the Fourteenth Amendment because of vagueness.

2. Whether the Petitioners were denied the equal protection of the laws as guaranteed under the Fourteenth Amendment by the application of the anti-SLAPP statute against them, limiting their access to the courts when they sought redress against a newspaper for a series of articles which defamed them and invaded their commercial and academic interests.

3. Whether the anti-SLAPP statute by depriving Petitioners of their right to discovery is fundamentally unfair in violation of their due process and equal protection rights under the Fourteenth Amendment.

4. Whether the Petitioners were incorrectly held to be limited purpose public figures.

PARTIES TO THE PROCEEDING

The other parties to this case not included in the caption are Dr. Victor Baranco, Dr. Cynthia Baranco, Humore Inc., a California corporation, The Private Sector, a California not-for-profit corporation, and Turn On To America, a California not-for-profit corporation, as Petitioners, and Dan Reed, April Lynch, and Alice Kahn, individually and as agents and employees of the Chronicle Publishing Company, as Respondents. There are no parent or subsidiary companies of the above-mentioned corporate petitioners.

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PETITION FOR WRIT OF CERTIORARI

Dr. Victor Baranco, Dr. Cynthia Baranco, Lafayette Morehouse Inc., Humore Inc., The Private Sector, and Turn On To America respectfully petition for a writ of certiorari to review the decision of the Court of Appeal of the State of California, First Appellate District, Division Five, review of which was denied by the Supreme Court of the State of California, affirming the judgment against petitioners by the Superior Court of California, County of San Francisco.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California is reported as Lafayette Morehouse Inc., et al. v. Chronicle Publishing Co., et al. (1995) 37 Cal.App.4th 855, 44 Cal.Rptr.2d 46. The Order of the California Supreme Court denying petitioners' petition for review is not reported.

JURISDICTION

The California Supreme Court denied petitioners' petition for review by order entered on November 30, 1995. There is no provision in California practice for the filing of a petition for rehearing of such a denial of a petition for review by the California Supreme Court.

This petition is being filed within 90 days after entry of the order on November 30, 1995, denying discretionary

review by the California Supreme Court. This Court has jurisdiction to review the decision of the California Court of Appeal's decision by writ of certiorari pursuant to 28 U.S.C. Section 1257(a). This petition shall be served on the Attorney General of the State of California as 28 U.S.C. Section 2403(b) may apply.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the interpretation of the following constitutional provisions and statutes:

1. The Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

> "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. California Code of Civil Procedure section 425.16, set out in the appendix hereto as Appendix G.

STATEMENT OF THE CASE

A. The Background of the Statute

The California anti-SLAPP statute, California Code of Civil Procedure section 425.16, became operative on January 1, 1993 as part of a nationwide effort at so-called tort reform. The

statute was designated Senate Bill 1264 in its legislative stage as introduced by California State Senator Bill Lockyer. The Senate Committee On Judiciary report on SB 1264 is found at Exhibit A to Appellants' Opening Brief filed in the California Court of Appeal. This Senate Report is particularly reliable in expressing the legislative intent behind the Statute because Bill Lockyer was also the Chairman of the Senate Committee on Judiciary. Page 4 of this report presents five examples of SLAPP suits which SB 1264 was intended to screen. None of these involved a media defendant. Senator Lockyer states on page 4:

> "These are lawsuits designed to silence ordinary citizens from trying to influence government. In a democratic society with the right to petition government being one of the fundamental liberties, we want to encourage participation."

This description explains the significance of the term SLAPP: "Strategic Lawsuits Against Public Participation."

This case is the first published decision which involves the anti-SLAPP statute being invoked by media defendants.

B. Statement of Facts

Petitioner Dr. Victor Baranco is an educator and teacher and the creator of a body of material which has proven effective in enhancing and enriching the lives of many students. Dr. Victor

Baranco is one of the founders and is now Dean Emeritus of More University, which operates under the aegis of the State of California Council for Private Postsecondary and Vocational Education. (AA at 239-240.)[1]

Petitioner Dr. Cynthia Baranco, at all times relevant hereto, was the Dean of Students at More University as well as an educator and teacher and also involved with her husband, Dr. Victor Baranco, in various charitable and humanitarian endeavors. (AA at 240.)

Petitioner Lafayette Morehouse Inc. is a corporation duly organized and existing under the laws of the State of California and is the lessee of certain property described in respondents' articles which are the subject of this suit. As another and separate function, Lafayette Morehouse Inc. operates and does business as More University. (AA at 240.)

Petitioner Humore Inc. is a corporation duly organized and existing under the laws of the State of California and is the lessor of the subject property described in respondents' articles which are the subject of this suit. (AA at 240.)

Petitioner The Private Sector is a

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1. Throughout this petition the following abbreviations are used: AA = Appellants' Appendix, RT = Reporter's Transcript.

not-for-profit corporation duly organized and existing under the laws of the State of California and a public charity which conducts good works in connection with the feeding of hungry and homeless people and generally provides aid to the needy of society. (AA at 240.)

Petitioner Turn On To America is a separate and distinct not-for-profit corporation duly organized and existing under the laws of the State of California and a public charity which conducts good works in connection with the feeding of hungry and homeless people and generally provides aid to the needy of society. (AA at 240-241.)

These petitioners were the targets of a series of articles published by respondents in The San Francisco Chronicle newspaper during 1992. An additional article appeared in September, 1993. This series, which amounted to a campaign, concerned the taking in as guests of some of the homeless people of Contra Costa County by the residents of an unincorporated area of the county and also regarded accusations against certain petitioners by a former student of More University. The series of articles was mostly written by a "free-lance correspondent" named Dan Reed and contained repeated patterns of falsehoods which, taken as a whole, were evidently intended to be sensational and to discredit petitioners and their business interests. Petitioners at first assumed that the articles did not disparage them intentionally and that, if they answered

the inquiries of respondent Reed, any future articles would be more objective. Consequently, certain representatives of petitioner Lafayette Morehouse Inc. reluctantly granted limited interviews with Reed, only to find that subsequent articles continued to mischaracterize and demean the petitioners.

The series of articles seemingly ended with the December 24, 1992 article. The following June, petitioners filed their complaint herein based on the ten most recent articles. Petitioners sought redress in this lawsuit. They had no conceivable ulterior purpose since the series had already concluded, and yet the law and motion court dismissed their amended complaint, without possibility of rudimentary discovery, characterizing it as a SLAPP suit, under the newly enacted anti-SLAPP statute.

C. The Decisions Below.

Respondents's special motion to strike pursuant to California Code of Civil Procedure section 425.16 was set for hearing January 21, 1994. In their moving papers, respondents contended that petitioners, without differentiation, are limited public figures. (AA 303-304.) Petitioners' opposition to the special motion to strike argued that petitioners are not public figures and raised equal protection and due process objections, particularly to the discovery stay provided in the statute and the denial of petitioners' access to the courts implicit in the statute. (AA 328-330.)

At the hearing on January 21, 1994, Judge Cahill seemingly recognized the constitutional problems inherent in the automatic discovery stay in the statute and stated that for this reason he was confining the scope of his inquiry to the question of the falsity of the statements as that information would presumably be in the possession of petitioners/plaintiffs. (RT of January 21, 1994 proceedings, at 12:19-21.) Judge Cahill's order which granted respondents' special motion to strike was entered January 28, 1994. This order stated that petitioners had not established a probability of prevailing on the element of falsity of the statements. (App. C, infra.)

Petitioners motion for reconsideration of this order was filed February 16, 1994. In their motion for reconsideration, petitioners argued that the statute is unconstitutionally vague and that it violates their right to the equal protection of the laws in that its application to the media in this case bears no rational relationship to the public purpose of the statute and also infringes upon petitioners' fundamental interests in their right of access to the judicial system and to non-falsely maligned reputations. (AA 461-465.) Judge Cahill's order denying petitioners motion for reconsideration was entered on July 5, 1994. In this order, the finding was made that petitioners had not established that they would prevail on the element of falsity of the statements and also on the element of "malice," thereby ruling that petitioners have public figure status.

(App. D, infra.) The judgment of the court dismissing the petitioners' amended complaint was entered August 10, 1994 (App. F, infra.), from which a timely notice of appeal was filed by petitioners. (AA 836-841.)

A major portion of appellants' opening brief was devoted to exposition of the above-mentioned federal constitutional questions. Petitioners argued that they are not limited purpose public figures at pages 2-14. Petitioners further argued the statute's unconstitutional vagueness at pages 19-20, the denial of their equal protection at pages 20-23, and the unconstitutional deprivation of their discovery on page 23.

On August 9, 1995, the California Court of Appeal, First Appellate District, Division Five, affirmed the judgment of the trial court against petitioners. (App. A, infra.) The appellate opinion ignored the questions of petitioners' public figure status and vagueness objections and rejected petitioners' equal protection and discovery preclusion challenges. Thereafter petitioners filed a petition for rehearing which was denied (App. E, infra.) and a petition for review to the California Supreme Court. On November 30, 1995, the California Supreme Court denied the petition for review without comment. (App. B, infra.)

REASONS FOR GRANTING THE WRIT

A.

THE CALIFORNIA ANTI-SLAPP STATUTE'S INDEFINITE AND VAGUE TERMS DENIED PETITIONERS THEIR DUE PROCESS RIGHTS.

The California Court of Appeal apparently adopted respondents' position that the California anti-SLAPP statute is not limited to SLAPP suits by holding that section 425.16 applies to the media defendant under one of the situations stated in subdivision (e) of the statute. (App. A. infra.)

This appellate opinion demonstrates the vagueness of the statute. One constitutional scholar has stated the principle as follows:

> "As a matter of due process, a law is void on its face if it is so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.'" (Tribe, American Constitutional Law (2d ed. 1988) p. 1033, quoting Connally v. General Construction Co. (1926) 269 U.S. 385, 391.)

Vague laws violate two fundamental principles of due process: (1) they leave the public guessing as to what actions are proscribed; and (2) they invite arbitrary and discriminatory enforcement by giving unbridled discretion, without explicit standards, to law enforcement officers and judges. (Grayned v. City of Rockford (1972) 408

U.S. 104, 108-109.) The Supreme Court has ruled that perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. (Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc. (1982) 455 U.S. 489, 499.) Petitioners have constitutionally protected fundamental interests in their right to equal access to the judicial system. (Logan v. Zimmerman Brush Co. (1982) 455 U.S. 422, 429-430, Boddie v. Connecticut (1971) 401 U.S. 371, 375-377. In this situation, "precision of regulation...must be the touchstone." (NAACP v. Button (1963) 371 U.S. 415, 438.) Such exactitude is necessary since "[u]ncertain meanings" inevitably lead citizens to "steer far wider of the unlawful zone"...'than if the boundaries of the forbidden areas were clearly marked.'" (Baggett v. Bullitt (1964) 377 U.S. 360, 372, quoting Speiser v. Randall (1958) 357 U.S. 513, 526.)

Petitioners had no fair warning or notice that they would be required by the arbitrary enforcement of a statute to prove their case at the initial stage without the procedural safeguards and benefits of discovery or trial by jury.

The statute makes no mention of the news media or freedom of the press. Yet, this statute has been applied against petitioners so as to bestow upon the media an immunity for whatever it reports. People "of common intelligence" could not have guessed at this outcome.

The legislative history of section 425.16 establishes that the Legislature intended to create a narrowly based anti-SLAPP statute which reflects the delicate balance between the right to protect one's reputation and livelihood on the one hand, and freedom of speech and the right to petition on the other. The problem addressed by the Legislature was the need to protect ordinary individual citizens, not the powerful media, from meritless lawsuits. There was no legislative intention to grant the news media a right to strike a civil complaint for defamation every time it published or broadcast an article which it considered to be regarding a public issue and then to seek an award of attorneys' fees for doing so. The practical effect of such a right is the creation of a virtual and unchecked license to defame for the news media.

The California Court of Appeal apparently attempted to avoid this egregious result by basing its decision in this case (even though respondents had not raised the issue) on the second class of suits described in subdivision (e) of section 425.16, i.e.:

> "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law."

The state appellate court stated in dicta its opinion that media defendants

could not qualify for the statute's protections under the third class in subdivision (e), i.e., "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest." (App. A. infra.) This creates the incongruous situation where media defendants can qualify under one clause of section 425.16, but not under another clause. If the Legislature had intended this anomalous result, it would have expressed it in plain words in the statute. The appellate court did not base its result upon the legislative history or purpose of the statute, which are diametrically opposed to this appellate decision.

The classic definition of a SLAPP suit is contrary to the facts of this case:

> "The typical SLAPP suit involves citizens opposed to a particular real estate development. The group opposed to the project, usually a local neighborhood, protests by distributing flyers, writing letters to local newspapers, and speaking at planning commissions or city council meetings. The developer responds by filing a SLAPP suit against the citizen group alleging defamation or various business torts." (Dixon v. Superior Court (1994) 30 Cal.App.4th 733, 741, emphasis in original.)

As another appellate court explained:

> "[T]he conceptual features which reveal them as SLAPPs are that they are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so." (Wilcox v. Superior Court (1994) 27 Cal.App.4th 809, 816.)

Ironically, the well-financed interests are being protected by the anti-SLAPP statute as it is interpreted in this case, and the petitioners, against whom the statute is being applied, are private individuals and limited-asset corporations, including two non-profit charitable corporations staffed entirely with volunteers. Far from attempts to deter respondents' articles, the suit was commenced over six months after the series of articles had intended. There is simply no way that people "of common intelligence" could have guessed at this result.

The Legislature acted to eliminate SLAPP suits, but it did so with a statute which is being interpreted in this action so as to eliminate libel suits against newspapers, since anything reported in the media is by definition and by the very fact of that publication a "public issue" which would trigger the application of the statute. The effort of the Legislature to limit the vague parameters of that concept by listing three types of suit included as "public issue" actions has, instead of clarifying the situation, only resulted in the unpredictable confusion of the appellate opinion herein which, under

one of these categories, imbues the powerful media with a carte blanche to print whatever it wants with impunity and financially ruin the private citizen who applies to the courts for redress. A citizen's right to vindicate his/her reputation and livelihood against the traditionally actionable transgressions of the press becomes illusory. Such a result obviously was not the intent of the Legislature. If the language of the statute supports this result, it is necessarily void for vagueness as people "of common intelligence" can and have differed at the meaning of the enactment.

Review by the Supreme Court is therefore necessary to settle the important question of law presented by the vagueness of the anti-SLAPP statute, to guide other courts in their interpretation of this murky statute, and to assist other efforts at tort reform to steer clear of the pitfalls of this enactment.

B.

THE CALIFORNIA ANTI-SLAPP STATUTE ON ITS FACE AND AS APPLIED DENIED PETITIONERS THE EQUAL PROTECTION OF THE LAWS BY LIMITING THEIR ACCESS TO THE COURTS WHEN THEY SOUGHT REDRESS FOR A SERIES OF ARTICLES WHICH DEFAMED THEM AND INVADED THEIR COMMERCIAL AND ACADEMIC INTERESTS.

The guarantee of the Fourteenth Amendment that no state shall "deny to any person within its jurisdiction the equal protection of the laws" is usurped by the application of the California

anti-SLAPP statute against petitioners. California courts are in accord with this Court in holding that the traditional equal protection analysis invokes the rational basis test:

> "'The standard formulation of the test for minimum rationality' [citation] is whether the classification is 'rationally related to a legitimate governmental purpose'. [Citation.] Put another way, the classification must bear some fair relationship to a legitimate public purpose. [Citation.]" (Board of Supervisors v. Local Agency Formation Commission (1992) 3 Cal.App.4th 903, 913.)

To apply section 425.16 in the context of a newspaper defending its defamatory writings and invasion of commercial and academic interests fails to bear a reasonable relationship to the express legislative purpose stated in the statute to curtail suits which are brought "to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (California Code of Civ. Proc. section 425.16 (a).) The newspaper already has significant First Amendment protections under its right to freedom of the press, as interpreted by this Court in such cases as New York Times v. Sullivan (1964) 376 U.S. 252 and its progeny. In fact, this Court has already ruled that the First Amendment privilege does not extend the New York Times standard to media defamation of private persons whenever

an issue of "general or public interest" is involved. (Gertz v. Robert Welch, Inc. (1973) 418 U.S. 323, 345-346.) The Gertz case, like the present case, involved a plaintiff who was involuntarily thrust into the "public attention." It was not the intention of the anti-SLAPP statute to expand on those press protections, but rather to provide shelter for people involved in participatory self-government. The application of the statute to immunize the media from responsibility for its reporting and to limit petitioners' access to the courts is not "rationally related" to the express purpose of the statute.

The modern equal protection analysis involves a two-tier approach. California courts again follow this Court in holding that such cases are subject to the "strict scrutiny" of the courts:

> "When a law imposes on certain fundamental rights...it will ordinarily be subject to strict judicial scrutiny. Under this very severe standard, a discriminatory law will not be given effect unless its classification bears a close relation to the promoting of a compelling state interest, the classification is necessary to achieve the government's goal, and the classification is narrowly drawn to achieve the goal by the least restrictive means possible." (Board of Supervisors v. Local Agency Formation Commission, supra, 3 Cal.4th 913.)

Fundamental interests are involved in the present case which require the strict scrutiny of the Court to determine if the statute, as applied, promotes a compelling state interest. Petitioners have fundamental interests in their right to equal access to the judicial system. This Court's decision in such cases as Logan v. Zimmerman Brush Co., supra, 455 U.S. 429-430; Boddie v. Connecticut, supra, 401 U.S. 375-377; and NAACP v. Button, supra, 371 U.S. 415 "support a theory of equal protection based on an idea that binding decision mechanisms not be structured so as to exclude any identifiable group, no matter what claims the group seeks to advance." (Tribe, American Constitutional Law, supra, at p. 1463.) Depriving petitioners of a trial by jury and requiring them to prove their case at the initial stage of litigation without benefit of discovery effectively excludes them from the judicial process for redress of their damages. No compelling state interest has been demonstrated to justify this arbitrary and discriminatory statute as it has been applied against petitioners.

Petitioners also have fundamental interests in their right to be free of falsely maligned livelihood and in their "pervasive and strong interest in preventing and redressing attacks upon a reputation." (Rosenblatt v. Baer (1966) 383 U.S. 75, 86.) Because it infringes upon fundamental interests of petitioners, the anti-SLAPP statute must meet the very strict standard of being shown to promote a compelling state

interest in bestowing additional unique protection to media defendants. In light of the great protection already afforded media defendants by the New York Times rule and the First Amendment, the draconian anti-SLAPP statute cannot be necessary to promote freedom of the press, particularly when that freedom is not even mentioned in the expressed statutory purpose. (Calif. Code of Civ. Proc. section 425.16(a).)

Both equal protection analyses reveal severe constitutional infirmities of the statute, facially and as applied here, which require the strict construction of section 425.16 to avoid invalid, overinclusive application of the statute, infringement of rights and protections, and deprivation of access to the court system for worthy plaintiffs. Review by this Court is therefore necessary to settle these important questions of law.

C.

DEPRIVING PETITIONERS OF DISCOVERY IS FUNDAMENTALLY UNFAIR.

The essential concept of both due process and equal protection analysis is "fundamental fairness" and "equal justice." As Mr. Justice Frankfurter pointed out:

> "Due process is that which comports with the deepest notions of what is fair and right and just. The more fundamental the beliefs are the less likely they are to be explicitly stated." (Solesbee v. Balkcom (1950) 339 U.S. 9, 16.)

and further:

> "Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by means that offend a sense of justice." (Rochin v. California (1952) 342 U.S. 165, 173.)

Mr. Justice Black stated:

> "Consequently, at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons...from invidious discriminations." (Griffin v. Illinois (1956) 351 U.S. 12, 18.)

By merely filing the special motion to strike, defendants are delegated the judicial power to terminate pretrial discovery unilaterally. (Calif. Code of Civ. Proc. section 425.16(g).) In effect, this provision of the anti-SLAPP statute enables defendants to checkmate their opponent on an uneven chess board, making a mockery of the fundamental fairness to which every party is entitled. Plaintiffs opposing a section 425.16 motion are expected to prove their case without the procedural tool of discovery accorded to other litigants. The statute gives the defendant the de facto power to control the plaintiff's discovery, allowing the defendant an undue advantage and a trump card and depriving the plaintiff the

fair opportunity to be heard, which elevates the chances of plaintiff losing without having the nuances of plaintiff's case presented to a jury. In this case, respondents were able by this means to prevent any inquiry by petitioners into the issue of petitioners' "actual malice."

The statute offers an illusory escape from this harsh result by proving that a plaintiff may request leave, upon noticed motion and for good cause shown, to pursue limited discovery after being served with a defendant's special motion to strike. (Cal. Code of Civ. Proc. section 425.16(g).) However, the strict time limitations imposed upon the motion to strike effectively preclude any discovery conducted in time for use in plaintiff's opposition to the motion since, the hearing on the motion to strike must be within thirty days after service of the motion. (Ibid.) The motion must be served at the initial stages of the litigation. (Cal.Code of Civ. Proc. section 425.16(f).)

The opinion of the appellate court recognized that the literal application of the discovery stay and thirty day hearing requirement of section 425.16 would deny a plaintiff's due process rights, particularly in a libel suit against the media. (App. A. infra.) The appellate court ruled that this severe hardship and constitutional infringement would be avoided in this case for two reasons. First, the appellate court found that petitioners had not sought discovery in this case and therefore could not complain of the

apparent inequity of the statute. Second, the Court of Appeal held that the trial court should liberally construe the statute to allow a continued hearing date for completion of authorized discovery prior to adjudication of the motion to strike. (App. A. infra.) These rulings are considered in order below.

The appellate court stated that this case had been pending for more than a year before the trial court issued its judgment and that petitioners did not request discovery during that time. This is misleading. The Chronicle filed its special motion to strike, along with its demurrer, as its appearance in this action on September 30, 1993. Petitioners' amended complaint was filed October 28, 1993, which rendered moot respondents' initial motion to strike. Respondents filed the second motion to strike on December 16, 1993. The hearing on this motion was held January 21, 1994, after which the lower court granted respondents' motion. Petitioners' motion for reconsideration was filed and served on February 16, 1994. The motion for reconsideration was not heard until July 1, 1994 due to a court-ordered continuance for personal reasons of Judge Cahill, the law and motion judge. Discovery was therefore stayed by statutory provision for most of the period prior to the hearing on the motion to strike on January 21, 1994. From that time until entry of the final judgment on August 12, 1994, no discovery would have been permitted since plaintiff's complaint was stricken and the only remedies available were

post-dismissal procedures. Petitioners did not request discovery because the plain meaning of the statute is to preclude discovery once the special motion to strike is filed. The law does not require a futile act.

The Court of Appeal held that the trial court must liberally construe the statute to allow a continuance of the hearing date to grant discovery in a case such as this where evidence to establish a prima facie case is in the possession of defendants. (App. A. infra.) Petitioners could not have known the appellate court would authorize this twisted interpretation of the statute. Petitioners followed the clear meaning of the statute, which erects an apparent and deliberate bar to discovery proceedings. Petitioners were thereby deprived of the tools they came to court to get. This inherent unfairness offends equal protection and due process principles.

Review by this Court is therefore necessary to settle the important question of law presented by the fundamental unfairness of the statute which authorizes a defendant to stay discovery during the pendency of the special motion to strike and enables a defendant to terminate the case without the plaintiff being given the opportunity to develop and prove the plaintiff's case.

D.

PETITIONERS WERE INCORRECTLY HELD TO BE LIMITED PURPOSE PUBLIC FIGURES IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT.

Respondents contended in their special motion to strike that petitioners are all limited purpose public figures who must prove respondents' "actual malice" in order to prevail on their claim.

At the hearing of January 21, 1994, Judge Cahill recognized the constitutional difficulty of requiring petitioners to prove respondents' "actual malice" without benefit of discovery, since this proof would depend upon evidence not in the petitioners' possession. Notwithstanding, Judge Cahill later ruled that petitioners had not established a probability of prevailing on the element of malice, in the Order Denying Motion For Reconsideration entered July 5, 1994. The trial court thus implicitly found petitioners to be limited purpose public figures.

The limited purpose public figure doctrine was first announced by this Court in Gertz v. Robert Welch, Inc., supra, 418 U. S. 323. The Gertz Court rejected the holding of the Court in Rosenbloom v. Metromedia, Inc., (1971) 403 U.S. 29, which applied the New York Times standard to any "issue of public or general concern":

"The extension of the New York

> Times test proposed by the Rosenbloom plurality would abridge this legitimate state interest [in protecting the reputation of a private individual] to a degree that we find unacceptable." (Gertz v. Robert Welch, Inc. supra. 418 U.S. 346.)

The Gertz Court also noted the difficulty of plunging judges into the business of deciding which issues were or were not of "general or public interest." (Ibid.) This is the same difficulty propounded by the California anti-SLAPP statute which requires judges to determine whether a particular case involves a "public issue."

The Gertz Court endeavored to lay down a broad rule which would preclude an ad hoc balancing of competing interests in each case. It began by noting that one factor distinguishing public officials and public figures was the remedy of self-help, i.e., "significantly greater access to channels of effective communication...and...a more realistic opportunity to counteract false statements than private individuals normally enjoy." (Id. at 344.) The Court then delineated three major classes of public figures. The first included persons who have "assumed roles of especial prominence in the affairs of society," (Id. at 345.), or who have achieved "general fame or notoriety." (Id. at 352.), as well as those who "occupy positions of...persuasive power and influence" (Id. at 345), or are "pervasive[ly] involved[d] in the

affairs of society." (Id. at 352.) Such persons are considered public figures for all purposes. A second class envisaged might hypothetically consist of those who become public figures through no purposeful action, "but the instances of truly involuntary public figures must be exceedingly rare." (Id. at 345.) The third class, the relevant one for the purposes of this case, is constituted of persons who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of issues involved." (Ibid.) These persons are public figures for a limited range of issues. As guidance for this category, the Court stated:

> "It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.," (Id. at 352.)

Subsequent United States Supreme Court cases have further explained this concept while applying the Gertz holding to specific cases. For example, the Court declined to apply the doctrine to a plaintiff who had prominence, fame, and notoriety, despite holding press conferences "to satisfy inquiring reporters." (Time, Inc. v. Firestone (1976) 424 U.S. 448, 454-455. Merely being associated "with a matter that attracts public attention," absent any attempt to engage the attention of the public to influence the resolution of issues involved, was "no basis

whatsoever for concluding that petitioner relinquished, to any degree, his interest in the protection of his name." (Wolston v. Reader's Digest Assn., Inc. (1979) 443 U.S. 157, 167-168.) Even closer on point with the present case, the Court held that "those charged with defamation cannot, by their own conduct create their own defense by making the claimant a public figure," particularly as he did not thrust himself into controversy to influence others and "did not have the regular and continuing access to the media that is one of the accouterments of having become a public figure." (Hutchinson v. Proxmire (1979) 443 U.S. 111, 135-136.)

This review of Gertz and post-Gertz cases justifies the comment of one scholar that "[a] fairly high threshold of public activity is evidently necessary for a finding that a person has voluntarily plunged into a public controversy." (Tribe, American Constitutional Law, supra, p. 881.)

Most of the petitioners have never received any publicity. They did nothing to inject themselves publicly into the issues generated and first publicized by the respondents' articles, which never amounted to "public controversy." These articles disparaged petitioners' business practices. This lawsuit concerned the ten most recent articles, but there were others. Representatives of Lafayette Morehouse held one press conference only to clarify what was already being reported inaccurately by The Chronicle regarding the hosting of homeless people as guests

on the Lafayette Morehouse property. Only three local reporters attended, including the reporter from The Chronicle. Otherwise petitioners completely avoided publicity. Petitioners never advertised, and they sought to remain anonymous. Most had never before been parties to litigation. They had no "regular and continuing access to the media," as do public figures. They can not be construed as public figures for the limited purpose of influencing any particular or identifiable public controversy.

The articles regarding petitioners did not concern a preexisting public controversy, as there is no identifiable public controversy regarding petitioners. Significantly, the other major Bay Area newspapers published no stories which mentioned any of the petitioners during the relevant time period of this case. The Chronicle articles were an attempt by respondents to manufacture a public controversy. Their lead was not followed by the other newspapers because the stories were not newsworthy.

The state appellate court by affirming the law and motion order has decided the important federal question whether or not petitioners are limited purpose public figures in a way that conflicts with relevant decisions of this Court.

CONCLUSION

For all of the reasons stated above, the petitioners Dr. Victor

Baranco, Dr. Cynthia Baranco, Lafayette Morehouse Inc., Humore Inc., The Private Sector, and Turn On To America respectfully pray that this Court grant their petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

LAFAYETTE MOREHOUSE, INC. et al.,
Plaintiffs/Appellants,

v.

THE CHRONICLE PUBLISHING COMPANY et al.,
Defendants/Respondents.

Filed 8/9/95
A067522
(San Francisco Superior Court No. 952459)

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In 1992, California enacted an anti-SLAPP statute. (Stats. 1992, ch. 726,[1] section 2, No. 10 West's Cal. Legis. Service, pp. 3031-3032; Code Civ. Proc.,[1] section 425.16.) SLAPP is an acronym for Strategic Lawsuit Against Public Participation. SLAPP litigation, generally, is litigation without merit filed to dissuade or punish the exercise of First Amendment rights of defendants. (Hull v. Rossi (1993) 13 Cal.App.4th 1763, 1769;cf. Wilcox v. Superior Court

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1. Unless otherwise indicated, all subsequent statutory references are to the Code of Civil Procedure.

(1994) 27 Cal.App.4th 809, 815-816 (Wilcox).)

Anti-SLAPP statutes such as section 425.16 provide a procedural remedy to expose and dismiss at an early stage such nonmeritorious actions which chill, inter alia, "the valid exercise of the constitutional rights of freedom of speech...." (Subd.(a).) Section 425.16, subdivision (b) does so by making "[a] cause of action against a person arising from any act of that person in furtherance of the person's [constitutional] right of...free speech...in connection with a public issue...subject to a special motion to strike," unless the person asserting that cause of action establishes by pleading and affidavit a "probability" of prevailing thereon.

In this appeal, we hold: (1) The corporate publisher of a newspaper and its reporters, who are sued for libel based on published articles made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, are all persons who may lawfully invoke the provisions of section 425.16. (2) On this record, appellants failed to show a probability they would prevail on their libel cause of action against respondents, and the trial court properly granted respondents' special motion to strike the cause of action under section 425.16.

I. FACTUAL AND PROCEDURAL BACKGROUND

This appeal arises from the trial court's decision to dismiss a libel complaint filed by More University and several affiliated persons and entities, against the company which publishes the San Francisco Chronicle and several of its reporters.

More University was founded in the late 1960's as an outgrowth of the alternative living experiments of the time. Located near Lafayette,[1] the university describes itself as a "unique" institution, which was established to "expand the physical, spiritual, and intellectual capacities" of its students, while maintaining "tolerance for all apparent alien encounters." The university offers courses in a variety of traditional disciplines such as art, music, and philosophy. However, the university also offers somewhat unique degrees in the areas of "sensuality," "lifestyles," and "communication." Students studying in these latter disciplines take courses in areas such as "niceness & meanness," "teasing," "sensuality," and "mutual pleasurable stimulation of the human

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1. We say that More is located near Lafayette; however, it not clear whether this is technically true. More admits that it formerly occupied the Lafayette site, but it contends that it does not currently operate there. More's college catalogue, however, continues to represnt that classes are offered at the Lafayette site. We need not resolve the ambiguity to decide this appeal.

nervous system." Through study and course work (both in class and at home), students can obtain advanced degrees in these fields, such as a Ph.D. in "sensuality."

In early 1992, persons living on the More University property permitted a large number of homeless to live in tents on the site. This influx caused a corresponding increase of complaints from neighbors who alleged they were subjected to the annoying and sometimes criminal behavior of these new residents. Store owners experienced a sharp increase in the number of aggressive panhandlers and persons harassing their customers. Homeowners reported cases of public urination and public intoxication. Other homeowners complained of an increase in litter and petty crime. A local police lieutenant reported a "significant" increase in the number of problems related to the More University property including felony assaults, panhandling, and abandoned vehicles in residential and commercial areas.

The Contra Costa County Board of Supervisors responded to these and other complaints by holding a series of public hearings beginning in May 1992, to discuss whether this use of the More University property violated local health, land use, or other governmental regulations. As a result of those hearings, the board of supervisors determined that permits were needed since the activities violated local zoning laws. When More University officials refused to comply with the

permit process or to cease the challenged activity, the county filed an action in state court to enjoin the alleged violations. More and various related entities responded by filing their own civil rights suit in federal court alleging the county's enforcement action violated their right to free expression and privacy.

Beginning in June 1992, the San Francisco Chronicle published a series of articles which described the dispute we have set forth above. The articles reported the influx of homeless living at the More University site and the corresponding increase in complaints from neighbors. The articles also discussed the board hearings which were held to discuss the problem, the county's enforcement action, and the university's complaint in federal court. The reporters who wrote the articles sometimes used colorful language in describing the dispute and the parties, e.g., characterizing More as a "sensuality school" and stating that it offered a "unique course in carnal knowledge." In addition, the articles characterized Victor Baranco, the founder of More, as a "reclusive guru" and accurately reported that he and his wife Cynthia were the subject of an LSD drug prosecution in Hawaii. The articles also reported the allegations of a former student, Alan Steele, who said that More coerced students into prostitution and provided them with LSD and other illegal drugs. Furthermore, the article accurately reported that More had filed a libel suit against Steele arising from his allegations.

More and various other persons and entities who were mentioned in the articles filed a complaint against the Chronicle and the reporters who wrote them.[1] As eventually amended, the complaint alleged seven causes of action, however, only one of them is relevant on the present appeal. More alleged that the newspaper articles were libelous.

The Chronicle responded to the complaint by filing a special motion to

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1. The complaint names as plaintiffs Lafayette Morehouse, Inc., which does business as More University; Dr. Victor Baranco; Dr. Cynthia Baranco; and three additional corporate entities, Humore, Inc., the Private Sector, Inc., and Turn on to America, Inc. The latter three corporations are apparently affiliated with More and helped provide assistance to the homeless living on the More University property. Two of them, the Private Sector, Inc., and Turn on to America, Inc., were mentioned in the articles in question.

The named defendants were the Chronicle Publishing Company, the entity which publishes the Chronicle, and the reporters who wrote the articles, Dan Reed, April Lynch, and Alice Kahn.

Unless otherwise indicated, we will refer to the plaintiffs collectively as More and to the defendants as the Chronicle.

strike under section 425.16.[1] Consistent with the language in that

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1. Section 425.16 provides in pertinent part as follows: "(b) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based. [Paragraph]...[Paragraph] (e) As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest."

section, the Chronicle argued that More could not establish there was a probability it would prevail on the complaint because, among other things, the articles were neither false nor defamatory. After hearing and argument, the trial court agreed and granted the special motion to strike, ruling that More had failed to present proof of falsity.

More then asked the court to reconsider its ruling, and it filed numerous declarations in support of its request. After argument, the court again denied the motion, finding that More had failed to present evidence of falsity, and that it had not presented a prima facie case of actual malice. This appeal followed.

II. DISCUSSION

A. Applicability of Section 425.16 to a Case Involving Media Defendants

The first issue is whether the trial court properly applied section 425.16 to the present suit. More argues that the statute was adopted to deal only with the problems presented by archetypal SLAPP suits, and that it should not be interpreted to apply to a libel suit brought against media defendants based on their news reporting activities.

In assessing the correctness of More's contention that section 425.16 must be interpreted to exclude the applicability of its special motion to strike procedure to a publisher of a

newspaper and its reporters sued for libel in the circumstances of this case, we are governed by familiar rules of statutory interpretation. Our primary duty when interpreting a statute is to effectuate the Legislature's intent. (Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com. (1990) 51 Cal.3d 744, 764.) When the language of a statute is clear and unambiguous, there is no need for interpretation and we must apply the statute as written. (Rojo v. Kliger (1990) 52 Cal.3d 65, 73; see also Ornelas v. Randolph (1993) 4 Cal.4th 1095, 1105, fn. 8.) With these rules in mind, we turn to statute at hand.

Section 425.16, subdivision (b) states, in part, "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

We find this plain language applies to the present libel cause of action brought against the Chronicle based on its news reporting activities. First, More does not seriously contend, and we do not find, that the statute's reference to "persons" renders it inapplicable. Section 17 specifically states that when the term "person" is used in a statute, it also applies to

corporations; and the fact that the Chronicle Publishing Company is a corporation does not exclude it from the ambit of the statute.

The principal issue then is whether the present suit arose from an act of the Chronicle "in furtherance of [its] right of...free speech under the United States or California Constitution in connection with a public issue." This quoted phrase is specifically defined by section 425.16, subdivision (e) to include, inter alia, "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law...."[1] "Connected" is

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1. We do not decide whether, as the Chronicle urges, the newspaper articles generating More's claim of libel constitute a "right of free speech" because they allegedly fit another category of that phrase defined by section 425.16, subdivision (e), viz.: "any written or oral statement or writing made in a <u>place open to the public or a public forum</u> in connection with an issue of public interest." (Italics added.) We find this alternate horn of the Chronicle's rationale for its authority to invoke the special motion to strike provided by section 425.16, subdivision (b) somewhat dubious. No authorities have been cited to us holding a newspaper printing allegedly libelous material is a "place open to the public or a public forum."

defined as "united by...dependence or relation." (Black's Law Dict. (6th ed. 1990) p. 302, col. 2.) The articles in question reported on the dispute between More and its neighbors over More's decision to open its property to the homeless and the related hearings held by the Contra Costa County Board of Supervisors to discuss that problem, the county's enforcement action, and More's responsive federal suit. They were clearly united by dependence on or relation to the official executive, legislative, and judicial actions they described. In sum, the alleged libelous newspaper articles were "writing[s] made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law...." (section 425.16, subd.(e)), triggering the application of the special motion to strike procedure of section 425.16, subdivision (b), if the Chronicle chose to make it.

The conclusion we reach here is supported by at least one commentator who has examined the issue. Michael D. Stokes, an attorney, helped draft portions of the Senate bill which

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Newspaper editors or publishers cutomarily retain the final authority on what their newspapers will publish in letters to the editor, editorial pages, and even news articles, resulting at best in a controlled forum not an uninhibited "public forum."

eventually added section 425.16 to the Code of Civil Procedure; and shortly after the bill was signed by the Governor, he wrote an article discussing the legislation. Among other things, Stokes noted that the bill had received support from an impressive array of newspapers who represented interests across the political spectrum. Stokes explained this support by observing that the language of the statute was broad enough to cover news reporting activity and that newspapers and publishers, who regularly face libel litigation, will be one of the "prime beneficiaries" of section 425.16. See Stokes, SLAPPING Down the Right to Trial by Jury: The SLAPP Legislation Confusion of 1992 (Cont.Ed.Bar 1992) 14 Civ.I.Rep. 485, 487.) Whether newspapers and publishers will, in fact, be the prime beneficiary of the statute remains to be seen. Stokes's (sic) conclusion, that the statute can be applied to media defendants, is consistent with our analysis, although he is somewhat critical of that conclusion, primarily because of his fears about discovery limitations when the statute is applied to media defendants. We address this issue, post.

More contends section 425.16 should not have been applied in the current case because news reporting activities are commonly thought to be protected by the constitutional guarantee of "freedom of the press." It argues that had the Legislature intended the statute to cover suits against the news media, it would have used the words "freedom of the press" not "freedom of speech" when

defining the activities to which the statute applies. However, the issue here is not whether the Legislature should have used different language if it intended the statute apply to news reporting activity, but whether the statute, as written, covers such activity. As we have explained, the statute does cover the type of reporting activity at issue here. Furthermore, More's argument is based on a faulty premise, i.e., that news reporting activity cannot be characterized as "free speech." In fact, courts have consistently described such activity as "free speech." (See e.g., Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 775-776 [newspaper articles equated with free speech]; Joseph Burstyn, Inc. v. Wilson (1952) 343 U.S. 495, 501 [newspapers characterized as a form of "expression"]; Daily Herald Co. v. Munro (9th Cir. 1988) 838 F.2d 380, 384 [media plaintiffs' broadcast of the results of exit polling is free speech].)

More also argues section 425.16 was not intended to apply to media defendants in libel actions, but only to situations such as that which the court in Wilcox, supra, 27 Cal.App.4th at pp. 815-816 (Wilcox) characterized as a "paradigm SLAPP" suit, a suit filed by a powerful land developer against individuals or organizations politically or legally opposed to the development. As the Wilcox court noted, however, such suits are not limited to environmental issues, nor are SLAPP suits always filed by powerful and wealthy plaintiffs against impecunious protesters who

annoy, delay, or frustrate plaintiffs' objectives. (Ibid.)

We conclude the trial court properly applied section 425.16 to the present dispute.

B. Challenges to the Constitutionality of Section 425.16

More raises a series of constitutional challenges to the application of section 425.16.

1. The Statute Does Not Deprive More of Due Process of Law Because It Is Rationally Related to a Legitimate Legislative Goal

More first contends that the statute infringed upon its ability to access the judicial system and, thus, violated its right to equal protection. We disagree. Statutes that classify litigants and impose differing procedural requirements are generally valid so long as classification is supported by a rational basis. For example, in Hung v. Wang (1992) 8 Cal.App.4th 908, 925-926 (Hung), the court ruled that Civil Code section 1714.10, which states that a plaintiff cannot file a complaint against an attorney based upon an alleged civil conspiracy unless the court determines there is a "reasonable probability" the plaintiff will prevail, was valid against an equal protection argument. The Hung court reasoned that the statute's requirements were "rationally related" to the Legislature's goal of relieving a perceived increase in

malpractice premiums and recusal motions resulting from claims that attorney's tortuously conspired with their clients. Our Supreme Court also rejected similar equal protection arguments in a series of cases which dealt with statutes that were enacted as part of the Medical Injury Compensation Reform Act of 1975 (Stats. 1975, Second Ex. Sess. 1975-76, ch. 2, section 12.5, p. 4007). (See American Bank & Trust Co. v. Community Hospital (1984) 36 Cal.3d 359, 370-373; Barme v. Wood (1984) 37 Cal.3d 174, 181-182; Roa v. Lodi Medical Group, Inc. (1985) 37 Cal.3d 420, 930-933; Fein v. Permanente Medical Group (1985) 38 Cal.3d 137, 161-164.) In each of these cases, the court ruled the relevant statutory provisions bore a rational relationship to the goal of easing the medical malpractice crisis and was valid under equal protection principles.

So too here. The Legislature made its intent crystal clear when adopting section 425.16. Subdivision (a) of the section states, "The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through the abuse of the judicial process." The procedure mandated by section 425.16 is rationally related to the Legislature's expressed goal. The

statute does not bar complaints which arise from a person's exercise of his or her rights of free speech or petition for redress of grievances, but only provides a mechanism through which such complaints can be evaluated at an early stage of the litigation process. Given the constitutional nature of these rights, and the "disturbing increase in lawsuits" which have been brought to discourage persons from exercising them, the Legislature could reasonably conclude such suits should be evaluated in an early and expeditious manner. The statute did not violate More's right to equal protection.

2. The Statute, Properly Construed, Does Not Violate the Right to Trial by Jury

Next, More focuses on the language of section 425.16, subdivision (b) which states a complaint is subject to a motion to strike "unless the court determines...there is a probability that the plaintiff will prevail on the claim. In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." More contends that this language obligates the court to weigh the evidence which has been submitted on the motion to strike and, thus, violates its right to a jury trial.

Section 425.16 is one of several California statutes providing a procedure for exposing and dismissing certain causes of action lacking merit.

Section 425.13 proscribes claims for punitive damages against health providers unless an amended pleading therefor is allowed, following a motion therefor supported by affidavits establishing a "substantial probability" that plaintiff will prevail on such claim. Section 425.14 bars punitive damages claims against religious corporations unless the court orders the filing of an amended pleading therefor on motion of plaintiff supported by affidavits "establish[ing] evidence which substantiates that plaintiff will meet the clear and convincing standard of proof" required for proof of punitive damages by Civil Code section 3294. Civil Code section 1714.10, subdivision (a) proscribes action against an attorney for civil conspiracy with his client based upon the attorney's representation of that client in attempting to contest or compromise a claim or dispute unless the court orders the filing of a pleading therefor on determining the plaintiff has "established that there is a reasonable probability that the [plaintiff] will prevail in the action." In varying language, all of these statutes literally require the trial court, at a preliminary stage of the litigation, to determine by examining affidavits the "substantial probability" of plaintiff's prevailing on a claim, whether evidence "substantiates" a standard of proof the plaintiff must meet, or whether plaintiff has "established...a reasonable probability" of recovery.

The principal constitutional attack mounted against statutes of this type

was that a trial judge, by making these determinations, was required to weight and adjudicate factual disputes in violation of the jury clause of the California Constitution. (Art. I, section 16.)

To save the statutes from this claimed constitutional violation, the appellate courts have construed their varying language as simply requiring the following: (1) The lower court must consider the challenged plaintiff's affidavits for the purpose of determining whether sufficient evidence has been presented to demonstrate a prima facie case. (Hung, supra, 8 Cal.App.4th at p. 931; Rowe v. Superior Court (1993) 15 Cal.App.4th 1711, 1723 (Rowe).) (2) "In making this judgment, the trial court's consideration of the defendant's opposing affidavits does not permit a weighing of them against plaintiff's supporting evidence, but only a determination that they do not, as a matter of law, defeat that evidence." (Rowe, supra, 15 Cal.App.4th at p. 1723.)

This analysis is confirmed as applicable to the post-filing motion to strike procedure of section 425.16. (Wilcox, supra 27 Cal.App.4th at pp. 823-825; Dixon v. Superior Court (1994) 30 Cal.App.4th 733, 746; Robertson v. Rodriguez (1995) 36 Cal.App.4th 347, 355-356 (Robertson).) Section 425.16 requires the plaintiff whose cause of action is subjected to that special motion to strike simply to demonstrate by affidavit a prima facie case. Thus, properly construed section 425.16,

subdivision (b) does not violate the right to a jury trial.

3. The Statute, Properly Construed, Does Not Deny Due Process by Arbitrarily Curtailing or Precluding Necessary Discovery

More's next argument touches on the concerns voiced by Stokes, ante, and is based on section 425.16, subdivision (g) which states, in part, "All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The motion shall be noticed for hearing not more than 30 days after service unless the docket conditions of the court require a later hearing." More contends that the combined effect of the discovery stay and 30-day hearing requirement violated its due process rights because it was unable to defend adequately the motion to strike. This argument rings hollow in this case. The record indicates that by the time the court issued its judgment, this case had been pending for more than a year. Furthermore, subdivision (g) also states that the "court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision." Not only did More never try to take advantage of this exception, it never sought any discovery in this case. Having never sought discovery or the benefit of the statutorily mandated exception, we cannot see how More's due process rights were violated. (Cf. Robertson, supra, 36 Cal.App.4th at p. 357.)

We acknowledge, however, that the discovery stay and 30-day hearing requirement of section 425.16 literally applied in all cases might well adversely implicate a plaintiff's due process rights, particularly in a libel suit against a media defendant. The court in Looney v. Superior Court (1993) 16 Cal.App.4th 521, 537 indicated that "an ample opportunity to conduct discovery," by a health care provider sued for punitive damages, was a substantial factor in balancing that defendant's right to nine month's notice of such claim prior to the trial date (section 425.13) against the plaintiff's right of trial preference (section 36, subds. (d) & (e)). That opportunity if sought is of prime import in a libel suit against a media defendant who will generally be the principal, if not the only, source of evidence concerning such matters as whether that defendant knew the statement published was false, or published the statement in reckless disregard of whether the matter was false and defamatory, or acted negligently in failing to learn whether the matter published was false and defamatory. Motions under section 425.16 commonly will be filed early in the legal proceedings, before the plaintiff has the opportunity to conduct (or complete) significant and necessary discovery. If the plaintiff makes a timely and proper showing in response to the motion to strike, that a defendant or witness possesses evidence needed by plaintiff to establish a prima facie case, the plaintiff must be given the reasonable opportunity to obtain that

evidence through discovery before the motion to strike is adjudicated. The trial court, therefore, must liberally exercise its discretion by authorizing reasonable and specified discovery timely petitioned for by a plaintiff in a case such as this, when evidence to establish a prima facie case is reasonably shown to be held, or known, by defendant or its agents and employees. Furthermore, while the statute says the motion to strike "shall be noticed for hearing not more than 30 days after service" (section 425.16, subd. (137g)), nothing therein prevents the court from continuing the hearing to a later date so that the discovery it authorized can be completed where a reasonable exercise of judicial discretion dictates that necessity therefor. So construed, the statute does not violate a plaintiff's right to due process of law in a libel action against a media defendant.

C. Whether More Met its Burden Under Section 425.16

The final issue is whether the trial court properly dismissed the suit under section 425.16. More argues the evidence before the court on the motion established a "probability" that it would prevail, and that the trial court erred when it granted the motion to strike. We disagree.

At the outset, More's briefs on this issue are seriously defective. Although More contends the evidence submitted to the trial court was sufficient to meet the requirements of

section 425.16, it does not clearly describe what evidence was sufficient to meet those requirements, or how that evidence made out a prima facie case of libel. Indeed, More's briefs do not even include a statement of facts as is required by rule 13 of the California Rules of Court. Instead, More has attached a 16-page exhibit to its opening brief which lists some of the allegedly defamatory statements contained in the Chronicle articles and then provides excerpts from the declarations which it submitted on the motion for reconsideration which dispute the statements' accuracy. Not only does this technique not comply with the rules of court, the document is not linked to the individual arguments in the brief and provides no clue as to how the individual statements can be deemed libelous under the applicable law. Thus, we are left to "guess" how More believes the trial court erred. It is axiomatic that a trial court's ruling is presumed 137 to be correct. (Walling v. Kimball (1941) 17 Cal.2d 364, 373.) An appellant "must convince the court, by stating the law and calling relevant portions of the record to the court's attention, that the trial court decision contained reversible error." (Cal. Civil Appellate Practice (Cont.Ed.Bar 1985) Evaluating Grounds for Reversal, section 4.10, p. 69; see also In Re Marriage of Behrens (1982) 137 Cal.App.3d 562, 575; Rossiter v. Benoit (1979) 88 Cal.App.3d 706, 712.) Since More has not clearly demonstrated that the trial court erred, we reject the claim for this reason alone.

Furthermore, More's arguments are unconvincing in any event. For example, More argues it was libeled when an article stated that it offered a "unique course in carnal knowledge." However, truth is a defense to a libel suit (5 Witkin, Summary of Cal. Law 9th ed. 1988) Torts, section 494, p. 583; see also Aisenson v. American Broadcasting Co. (1990) 220 Cal.App.3d 146, 154), and the article's statement was undeniable (sic) true. More's general catalogue shows it offers in "Advanced Sensuality" and "Mutual Pleasurable Stimulation of the Human Nervous System." Even a cursory glance at the content of these courses shows the essential accuracy of the Chronicle's characterization.[1]

...Continued...

1. More's course description for the "Advanced Sensuality" class explains that "Students work with partners" and do "research and experimentation" in the areas of "engorgement, lubrication, seminal secretion." The outline for the class in "Mutual Pleasurable Stimulation of the Human Nervous System" (which is limited to married couples and consenting adults) states that students will examine "partner exchange, emotional involvement related to sexing and oral-genital relationships." The outline further explains that the successful student will be required to "come undeniably every day," and that one of the goals of the course is to "make friends with another crotch." The outline also cautions students to bring

More also argues it was libeled when the Chronicle described it as a "sensuality school." However, it is undisputed that More offers an advanced degree in "sensuality" and that many of its courses have an explicitly sexual theme. Since the substance and gist of the characterization is true, any minor inaccuracy cannot be deemed libelous. (Heuer v. Kee (1936) 15 Cal.App.2d 710, 714.)

More contends that its founder, Victor Baranco, was libeled when the Chronicle described him as a "reclusive guru." However, a statement cannot be deemed libelous unless it conveys to the recipient a provably false assertion of fact. (San Francisco Bay Guardian, Inc. v. Superior Court (1993) 17 Cal.App.4th 655, 659.) The term, as used in the articles in question, was not capable of being proven true or false.

More also contends it was libeled because the Chronicle reported that a former student, Alan Steele, had alleged the school was engaged in questionable

---

...Continued...

"small hand towels, and lubricant, plus latex gloves" to class. To obtain a doctorate in sensuality, a male student "must demonstrate how to take control of a woman's level of tumescence in a laboratory setting under the direct supervision of the faculty of the Sensuality Department." A female student "must demonstrate, for one hour,

and illegal activity. However, More itself sued Steele for libel because of his allegations, and the Chronicle simply reported the same facts contained in the libel suit. A "fair and true" report of a judicial proceeding is absolutely privileged. (Civ. Code, section 47, subd, (d),) More's briefs on appeal do not even attempt to explain why this privilege is inapplicable.

We conclude More has not met its appellate burden of showing error. The trial court properly granted the motion under section 425.16.

III. DISPOSITION

The judgment is affirmed.

_____
PETERSON, P.J.

WE CONCUR:

_____
KING, J.

_____
HANING, J.

...Continued...

her ability to respond to the direct control of her level of tumescence at the hands of a certified partner in the laboratory setting."

APPENDIX B

First Appellate District,
Division Five, No. AO67522
SO48914

IN THE SUPREME COURT OF CALIFORNIA

LAFAYETTE MOREHOUSE INCORPORATED Et Al.,
Appellants

v.

THE CHRONICLE PUBLISHING COMPANY Et Al.,
Respondents

Petition for review DENIED

The request for an order directing depublication of the opinion are denied.

SUPREME COURT

FILED

NOVEMBER 30, 1995

Robert Wandruff Clerk
DEPUTY

Lucas
Chief Justice

APPENDIX C

CALIFORNIA SUPERIOR COURT

CITY AND COUNTY OF SAN FRANCISCO

DEPARTMENT NUMBER TEN

LAFAYETTE MOREHOUSE, INC., a California corporation, DR. VICTOR BARANCO, DR. CYNTHIA BARANCO, HUMORE INC., a California corporation, THE PRIVATE SECTOR, a California not-for-profit corporation, and TURN ON TO AMERICA, a California not-for-profit, corporation,

Plaintiffs,

vs.

THE CHRONICLE PUBLISHING COMPANY, DAN REED, Individually and as Agent and Employee of THE CHRONICLE PUBLISHING COMPANY, APRIL LYNCH, Individually and as Agent and Employee of THE CHRONICLE PUBLISHING COMPANY, and ALICE KAHN, Individually and as Agent and Employee of THE CHRONICLE PUBLISHING COMPANY, and DOES I THROUGH XX,

Defendants.
/

No. 952459

ORDER GRANTING DEFENDANT'S SPECIAL MOTION TO STRIKE

On January 21, 1994, Defendant the Chronicle Publishing Company's special motion to strike was ordered submitted for ruling by the Honorable William

Cahill. After full consideration of the papers and oral argument in support of and in opposition to the motion, the Court orders that the motion is granted. The plaintiff did not meet its burden of proof under Code of Civil Procedure section 425.16. The Plaintiff did not establish that there is a probability that the Plaintiff will prevail on the claims because, at a minimum, the plaintiff failed to submit sufficient evidence that the statements complained of are false.

DATED: January 24, 1994.

WILLIAM CAHILL
WILLIAM CAHILL
Judge of the
Superior Court

APPENDIX D

CALIFORNIA SUPERIOR COURT

CITY AND COUNTY OF SAN FRANCISCO

DEPARTMENT NUMBER TEN

LAFAYETTE MOREHOUSE, INC., et al.,
NO. 952459

Plaintiffs,

vs.

ORDER DENYING MOTION FOR RECONSIDERATION

THE CHRONICLE PUBLISHING COMPANY, et al.,

Defendants.

_____/

On July 1, 1994, plaintiffs' motion for reconsideration was ordered submitted for ruling by the Honorable William Cahill. After full consideration of the papers and oral argument in support of and in opposition to the motion, it is hereby ordered that the motion is denied.

Plaintiff has filed to establish that there is a probability that the plaintiff will prevail on the claim pursuant to C.C.P. section 425.16. Specifically, the plaintiff has failed to meet its burden with respect to the element of the falsity of the defamatory language as well as to the element of malice.

DATED: July 1, 1994

/s/ William Cahill
WILLIAM CAHILL
Judge of the Superior Court

APPENDIX E

COURT OF APPEAL OF THE

STATE OF CALIFORNIA

IN AND FOR THE

FIRST APPELLATE DISTRICT

DIVISION: 5

LAFAYETTE MOREHOUSE, INC., ET AL.
vs.
CHRONICLE PUBLISHING CO., ET AL.
A067522 Old No. A068884
San Francisco County No. 952459

BY THE COURT:

The petition for rehearing is denied.

Dated: September 1, 1995

PETERSON, P.J.

APPENDIX F

JAMES M. WAGSTAFFE (State Bar No. 95535)
MARK L. TUFT (State Bar No. 43146)
CAROL URZI (State Bar No. 136540)
COOPER, WHITE & COOPER
201 California Street
Seventeenth Floor
San Francisco, California 94111
Telephone: (415) 433-1900

Attorneys for Defendants
THE CHRONICLE PUBLISHING COMPANY,
DAN REED, APRIL LYNCH, AND ALICE KAHN

SAN FRANCISCO SUPERIOR COURT

COUNTY OF SAN FRANCISCO

LAFAYETTE MOREHOUSE, INC., a California corporation, DR. VICTOR BARANCO, DR. CYNTHIA BARANCO, HUMORE INC., a California corporation, THE PRIVATE SECTOR, a California not-for-profit corporation, and TURN ON TO AMERICA, a California not-for-profit corporation,

Plaintiffs, No. 952459

vs. NOTICE OF ENTRY OF JUDGMENT (CCP Section 664.5)

THE CHRONICLE PUBLISHING COMPANY, DAN REED, Individually and as Agent and Employee of THE CHRONICLE PUBLISHING COMPANY, APRIL LYNCH, Individually and as Agent and Employee of THE CHRONICLE PUBLISHING COMPANY, and ALICE

KAHN, Individually and as Agent and Employee of THE CHRONICLE PUBLISHING COMPANY, and DOES I THROUGH XX,

Defendants.
_____/

TO ALL PARTIES TO THIS ACTION AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on August 8, 1994, judgment was entered on behalf of defendants in the above captioned matter, and on August 10, 1994, said Judgment was filed. A copy of the judgment is attached hereto.

Dated: August 12, 1994

COOPER, WHITE & COOPER
JAMES M. WAGSTAFFE
MARK L. TUFT
CAROL J. URZI

By /s/ Mark L. Tuft
MARK L. TUFT

ATTORNEYS FOR DEFENDANTS THE CHRONICLE PUBLISHING COMPANY, DAN REED, APRIL LYNCH, AND ALICE KAHN

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Attorneys for Defendants
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SAN FRANCISCO SUPERIOR COURT

COUNTY OF SAN FRANCISCO

LAFAYETTE MOREHOUSE, INC., a California corporation, DR. VICTOR BARANCO, DR. CYNTHIA BARANCO, HUMORE INC., a California corporation, THE PRIVATE SECTOR, a California not-for-profit corporation, and TURN ON TO AMERICA, a California not-for-profit corporation,

Plaintiffs, No. 952459

vs. JUDGMENT

THE CHRONICLE PUBLISHING COMPANY, DAN REED, Individually and as Agent and Employee of THE CHRONICLE PUBLISHING COMPANY, APRIL LYNCH, Individually and as Agent and Employee of THE CHRONICLE PUBLISHING COMPANY, and ALICE KAHN, Individually and as Agent

and Employee of THE CHRONICLE PUBLISHING COMPANY, and DOES I THROUGH XX,

Defendants.
_____/

This Court, on January 28, 1994, having granted defendants' Special Motion to Strike the complaint under Code of Civil Procedure Section 425.16(b) after full consideration of the papers and oral argument in support thereof, and,

this Court, on July 5, 1994, having denied plaintiffs' Motion for Reconsideration of the Court's Order granting defendants' Special Motion to Strike the complaint, after full consideration of the papers and oral argument in support therof,

IT IS HEREBY ORDERED THAT plaintiffs' first amended complaint be dismissed with prejudice and that

JUDGMENT BE ENTERED in favor of each defendant against plaintiffs on all causes of action.

IT IS FURTHER ORDERED THAT defendants be awarded their costs pursuant to statute.

ACTING AS PRESIDING JUDGE
OF THE COURT IN THE
ABSENCE OF THE JUDGE WHO
HEARD THE CAUSE

Dated: Aug. 8, 1994

RICHARD P. FIGONE
THE HONORABLE WILLIAM J. CAHILL

APPROVED AS TO FORM:

Dated:

LAW OFFICES OF RICHARD W. HYLAND

By_____
RICHARD W. HYLAND
Attorney for Plaintiffs
LAFAYETTE MOREHOUSE, INC.,
DR. VICTOR BARANCO,
DR. CYNTHIA BARANCO,
HUMORE INC., THE PRIVATE SECTOR,
and TURN ON TO AMERICA

APPENDIX G

CALIFORNIA CODE OF CIVIL PROCEDURE

Section 425.16 (a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.

(b) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, and no burden of

proof or degree of proof otherwise applicable shall be affected by that determination.

(c) In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes any written or oral statement or writing made before a legislative, executive,or judicial proceeding, or any other official proceeding authorized by law; any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The motion shall be noticed for hearing not more than 30 days after service unless the docket conditions of the court require a later hearing. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) On or before January 1, 1998, the Judicial Council shall report to the Legislature on the frequency and outcome of special motions made pursuant to this section, and on any other matters pertinent to the purposes of this section. Added Stats 1992 ch 726 section 2 (SB 1264). Amended Stats 1993 ch 1239 section 1 (SB 9).

Supreme Court, U.S.
FILED
APR 2 1996
CLERK

(2)

1770
No.

In The Supreme Court of The United States

OCTOBER TERM, 1995

LAFAYETTE MOREHOUSE, INC., et al.,
Appellants.

vs.

THE CHRONICLE PUBLISHING COMPANY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FIVE

BRIEF FOR RESPONDENTS IN OPPOSITION

JAMES M. WAGSTAFFE
MARK L. TUFT
COOPER, WHITE & COOPER

201 California Street, Seventeenth Floor
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Telephone: (415) 433-1900
Attorneys for Respondents
The Chronicle Publishing Company, Dan Reed, April Lynch and Alice Kahn

12 pp

QUESTIONS PRESENTED

Respondents do not challenge the questions presented by petitioners. However, petitioners raise no important questions of federal law nor do they implicate any federal question in conflict with the decision of any state or federal court.

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In The Supreme Court of The United States

OCTOBER TERM, 1995

LAFAYETTE MOREHOUSE, INC., et al.,
Appellants

vs.

THE CHRONICLE PUBLISHING COMPANY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FIVE

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the California Court of Appeal (Pet. App. 1-26) is reported at 37 Cal.App.4th 855. The Order of the California Supreme Court denying petitioners' petition for review (Pet. App. 27) is unreported.

JURISDICTION

Respondents do not disagree with petitioners' jurisdictional statement.

STATEMENT OF THE CASE

This action involves review of the dismissal of a meritless libel suit brought by Lafayette Morehouse, Inc., dba More University ("More"), et al. against The Chronicle Publishing Company ("Chronicle"), et al. based on news reports that accurately reported More's involvement in a highly controversial zoning dispute. As found by the California trial and appellate courts, Chronicle also accurately reported that More was a "sensuality school" since this "university" offered graphic courses in sexuality and even a Ph.D. in "Sensuality."

Although More's libel complaint challenged Chronicle's description of the college as a "sensuality school," the facts indisputably demonstrated the accuracy of this statement. More University offered classes in "Fundamentals of Sensuality," "Basic Sensuality," "Basic Hexing," "Man/Woman," "Aphrodisia," "Advanced Sensuality Laboratory," and even one called "Mutual Pleasurable Stimulation of the Human Nervous System." [*See* Pet. App. 3-5] Through course studies and with laboratory work, students are able to earn a degree and eventually a Ph.D. in "sensuality." [*Id.*]

In early 1992, More permitted a large number of homeless persons to live in tents on its property that was located in a residential neighborhood in Lafayette, California. Predictably, More's neighbors lodged formal complaints with Contra Costa

County concerning problems that resulted in connection with More's unauthorized activities. Contra Costa County's Board of Supervisors responded by holding public hearings and asking its staff to prepare a report. Chronicle accurately reported the contents of these public records, including the complaints of neighbors that the "guests" at Lafayette posed a fire hazard and were panhandling in nearby locations. [*Id.*]

More's representatives held a press conference to announce their refusal to cease the challenged activities. As a result, the County filed a state court lawsuit to enjoin the alleged zoning violations. More interjected itself further into this public controversy by filing its own civil rights lawsuit against Contra Costa County in federal court. Chronicle accurately reported the allegations in these lawsuits.

Upon being sued by More for libel, Chronicle moved to strike the lawsuit under Cal. C.C.P. § 425.16, California's anti-SLAPP statute. The trial court granted the motion because More presented no evidence showing that the articles were false or that Chronicle published the news articles in question with actual malice; in contrast, Chronicle submitted substantial evidence, declarations and public records demonstrating the truth of the matters challenged in the articles.

The California Court of Appeal affirmed the trial court's order granting the motion to strike on two separate grounds. First, the Court ruled that More did not present a statement of facts in its brief and, therefore, it had failed to meet its burden of showing error. [Pet. App. 21-22] Second, the Court of Appeal ruled that More had failed to make a factual showing in the trial court supporting its libel claims. [Pet. App. 23-24]

What More has ignored at each judicial level is that the articles in question were true. Chronicle accurately reported information contained in public records concerning the Contra Costa County zoning dispute and demonstrated through More's course catalogue that it had a "sensuality" curriculum. [Pet. App. 23-24]

More also ignored Chronicle's undisputed evidence that its writers believed the articles were truthful and thus lacked actual malice. More presented no evidence on this dispositive point and it never made a request for any discovery, despite the fact that the Court did not hold its hearing on Chronicle's motion for many months. [*Id.*]

ARGUMENT

The decision of the California Court of Appeal is correct with respect to the issues being raised here by petitioners, and does not conflict with any decision of this Court or any other state or federal court. Since there are no important federal questions raised here, further review is not warranted.

A. More's Constitutional Attacks Are Infirm And Do Not Warrant Review By This Court

More makes a scattershot attack on the constitutionality of section 425.16, asserting that this statute is void for vagueness, violative of equal protection and "fundamentally unfair." [Pet. 9-18] However, as the Court of Appeal correctly ruled, these arguments are meritless because More simply misapprehends the scope of the constitutional protection in question.

More first argues that the statute gave it no "fair warning" that it would have to produce information showing a *prima facie* case at the outset. [Pet. 10] This argument is frivolous. This is precisely what the statute says and it is consistent with established interpretations of similar statutes. California's courts have long held that the legislature can enact statutes requiring a party to come forward -- even in early stages of litigation -- with the facts showing there is a genuine issue for trial. *See Hung v. Wang* (1992) 8 Cal.App.4th 908, 927. There is nothing "vague" about such statutory procedures.

More's equal protection argument is also misguided. As the Court of Appeal held, the protections included in section 425.16 are rationally related to the Legislature's expressed goal of reducing "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances." Cal. C.C.P. § 425.16(a). The Court's rejection of More's argument is consistent with existing law and is wholly unremarkable. *See American Bank & Trust Co. v. Community Hospital* (1984) 37 Cal.3d 174, 181-82 (statute offering protection in malpractice suits not violative of equal protection); *Mountain Water Co. v. Montana Dept. of Pub. Serv. Reg.* (9th Cir. 1990) 919 F.2d 593, 597 (statute distinguishing between privately and publicly owned utilities constitutional).

Finally, the Court of Appeal also correctly ruled that there was nothing "fundamentally unfair" about the statute's discovery limitations as applied to the circumstances of this case. [Pet. App. 19-21] Quite simply, More never exercised its statutory right to request leave to take discovery -- despite many months in which to do so. This failure waived any challenge. *See Robertson v.*

Rodriguez (1995) 36 Cal.App.4th 347, 357 (failure to seek discovery under statute waives challenge to its unavailability).

More's argument also fails because there is no due process right to discovery in the first instance. This Court repeatedly has emphasized that "no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause." *Kremer v. Chemical Const. Corp.* (1982) 456 U.S. 461, 483. Considering that pretrial discovery to gather evidence was largely unknown at the time the fifth and fourteenth amendments were adopted, it would be anomalous if discovery were the exception to the general rule that the constitution permits flexibility in procedure, so long as fundamental fairness is maintained. *See Midway Motor Lodge v. Innkeepers' Telemgmt. & Equip.* (7th Cir. 1995) 54 F.3d 406, 408; *Wardius v. Oregon* (1973) 412 U.S. 470, 474 (no constitutional right to unlimited pretrial discovery in criminal cases).

B. More Seeks Review of a Public Figure Analysis Not Contained in the Court of Appeal's Opinion

More would have this Court review an issue as to the public figure doctrine not discussed in the Court of Appeal's Opinion. This Court should not review an appellate decision on an issue that was not even included in the Opinion under consideration.

Even if the Court had specifically addressed this topic, there is no doubt that More and its affiliated co-plaintiffs are public figures as determined correctly by the trial court. *Denney v. Lawrence* (1994) 22 Cal.App.4th 927, 934 (plaintiff who gave press interviews and promoted his version of controversy is public

figure); *Rudnick v. McMillan* (1994) 25 Cal.App.4th 183, 1190 (rancher who facilitated press coverage is public figure); *Nadel v. Regents of University of California* (1994) 28 Cal.App.4th 1251, 1269-70 (plaintiffs who spoke publicly at city council meeting, at political events and in a press conference are public figures).

More satisfies this established test. Along with its personnel and related corporate entities, More became the subject of enormous publicity arising from disputes with owners of neighboring properties. They conducted a press conference, issued a press release and attempted to control the resolution of this controversy. Moreover, More responded to the zoning controversy and to its students' charges by filing several high profile state and federal lawsuits. They were limited public figures and review is unnecessary to address this long settled area of law.

CONCLUSION

There is no basis for this Court to review this well-reasoned appellate decision. Petitioners have shown no conflict among the lower courts nor have they shown any compelling reason to review the legal issues correctly decided below. Since this lawsuit was frivolous at its outset and remains so, Chronicle

respectfully requests that this Court end this litigation and deny More's Petition.

DATED: April 1, 1996

COOPER, WHITE & COOPER
JAMES M. WAGSTAFFE
MARK L. TUFT

JAMES M. WAGSTAFFE
Attorneys for Respondents

PROOF OF SERVICE

I am a member of the Bar of the Supreme Court, and a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Cooper, White & Cooper, 201 California Street, Seventeenth Floor, San Francisco, California 94111.

On April 1, 1996, I served the within **BRIEF FOR RESPONDENTS IN OPPOSITION** documents on the parties listed below as follows:

United States Supreme Court — **By Federal Express**
1 First St., N.E.
Washington, D.C. 20543

Court of Appeal — **By First Class Mail**
State of California
First Appellate District, Division Five
303 Second St., South Tower
San Francisco, CA 94107

Richard W. Hyland, Esq. — **By First Class Mail**
3237 Deer Hill Road
Lafayette, CA 94549
(510) 283-7163

Walter P. Maksym (Pro Hac Vice) — **By First Class Mail**
Walter Maksym & Associates
1550 Spring Road, Suite 225
Oak Brook, IL 60521

☐ **By facsimile machine (FAX)** by personally transmitting a true copy thereof via an electronic facsimile machine.

☒ **By first class mail** by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid and placing the envelope in the firm's daily mail processing center for mailing in the United States mail at San Francisco, California.

☐ **By personal service** by personally delivering a true copy thereof to the addresse(s) listed herein at the location listed herein.

☒ **By Federal Express** or overnight mail.

☐ *(State)* I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

___

☐ *(Supreme)* I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on April 1, 1996, at San Francisco, California.

JAMES M. WAGSTAFFE